

In the Matter of the Compensation of  
**IMMER GUTIERREZ, Claimant**  
WCB Case No. 21-04477, 21-03711, 21-03570, 21-03150  
**ORDER ON REVIEW**  
Julene M Quinn LLC, Claimant Attorneys  
Reinisch Wilson PC, Defense Attorneys  
Sather Byerly Holloway - SBH Legal, Defense Attorneys  
Wallace Klor Mann Capener, Defense Attorneys

Reviewing Panel: Members Curey and Ousey.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Ogawa's order that declined to award an ORS 656.386(1) attorney fee. On review, the issue is attorney fees. We reverse.

**FINDINGS OF FACT**

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

In February 2021, claimant slipped and fell while unloading a washing machine from a truck. (Ex. 1; Tr. 20). The washer fell on top of him. (Ex. 1; Tr. 20).

That same day, claimant sought emergency medical treatment from Dr. Hoskins, who recorded pain in the left arm, left chest, left lower abdomen, both hips, left leg, and back. (Exs. 1A, 1B-6; Tr. 22). He also noted tenderness in the back, left pelvis, left lower leg, and left elbow. (Ex. 1B-7). Dr. Hoskins diagnosed acute bilateral low back pain, a left leg contusion, and a left elbow abrasion. (Ex. 1B-5).

At the time of the February 2021 work incident, claimant was delivering appliances for SA Trucking. (Tr. 14-15). SA Trucking had contracted with a logistics company that had contracted with Costco Wholesale Corporation to deliver Costco products. (Ex. 6-13-14, -17-32, 33-89).

In March 2021, claimant initiated an injury claim. (Ex. 4). Claimant also requested that the Workers' Compensation Division (WCD) investigate whether SA Trucking was a noncomplying employer. (Ex. 4-1).

In May 2021, the WCD determined that SA Trucking was a noncomplying employer. (Ex. 6-13). In addition, the WCD concluded that Costco was responsible under ORS 656.029.<sup>1</sup> (Ex. 6-15).

Later that month, the WCD directed Costco to accept or deny claimant's injury claim within 60 days and provide prompt payment of all compensation that may become due under ORS chapter 656. (Ex. 7-1). Further, the WCD stated that within the terms of its acceptance or denial, Costco must also address its responsibility under ORS 656.029. (*Id.*)

In July 2021, Costco denied claimant's injury claim. (Ex. 8-1). Costco based its denial on the following grounds: that claimant was not a "subject worker" under ORS 656.126; that he did not meet the "permanent employment relation test;" that he lacked privity of contract between SA Trucking and Costco; and that Costco was not responsible under ORS 656.029. (Ex. 8-1-2). In addition, the denial advised claimant of his rights and responsibilities, including that he must file a request for hearing within 60 days if he disagreed with "this denial." (Ex. 8-2). The denial also cited ORS 656.319(1)(a), pertaining to a worker's objection to a denial, and ORS 656.325(1)(a), regarding medical examinations requested by the carrier. (*Id.*)

Before the hearing, Costco confirmed that it was disputing subjectivity and responsibility. (Tr. 3-4).

### CONCLUSIONS OF LAW AND OPINION

The ALJ found that claimant was a subject worker under ORS 656.126 and that Costco was responsible under ORS 656.029.<sup>2</sup> Accordingly, the ALJ set aside Costco's July 2021 denial. In addition, the ALJ awarded an ORS 656.308(2)(d) attorney fee for claimant's attorney's services regarding the "responsibility" issue.<sup>3</sup> Declining to award an ORS 656.386(1) attorney fee, the ALJ reasoned that ORS 656.386(1) did not apply because subjectivity was at issue, not compensability.

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<sup>1</sup> ORS 656.029 provides that a general contractor is responsible for providing workers' compensation coverage in certain circumstances.

<sup>2</sup> Costco did not appeal the ALJ's subjectivity or responsibility findings.

<sup>3</sup> Costco did not appeal the ALJ's ORS 656.308(2)(d) attorney fee award regarding the responsibility issue.

On review, claimant contends that his attorney is entitled to an ORS 656.386(1) attorney fee. Based on the following reasoning, we agree with claimant's contention.

Under ORS 656.386(1)(a), a claimant's attorney is entitled to a reasonable attorney fee in cases involving denied claims where the claimant finally prevails. ORS 656.386(1)(b) defines "denied claim" as "[a] claim for compensation which an insurer or self-insured employer refuses to pay on the express ground that the injury or condition for which compensation is claimed is not compensable or otherwise does not give rise to an entitlement to any compensation[.]"

In *SAIF v. Wart*, 192 Or App 505, 512-13 (2004), the court held that the carrier's noncooperation denial was a "denied claim" for purposes of ORS 656.386(1). Analyzing the "otherwise does not give rise to an entitlement to any compensation" language in ORS 656.386(1)(b), the court reasoned that ORS 656.386(1) is not limited to compensability denials. *Wart*, 192 Or App at 512-13, 515. The court explained that by issuing a noncooperation denial, the carrier was refusing to pay compensation on the basis that the claimant failed to cooperate with its investigation of the claim. *Id.* at 512. The court found that the carrier's noncooperation denial constituted a refusal to pay a claim for compensation, not on the basis that the injury was not compensable, but, rather, on the basis that the claim "otherwise does not give rise to an entitlement to any compensation." *Id.* at 515. Therefore, the court concluded that claimant's counsel was entitled to an ORS 656.386(1) attorney fee. *Id.* at 523.

Here, similar to *Wart*, Costco denied claimant's injury claim, not on the basis that the injury was not compensable, but, rather, on the basis that claimant was not a subject worker – a basis that precludes the entitlement to any compensation. (Ex. 8). Specifically, ORS 656.005(8) defines "compensation" as "all benefits, including medical services, provided for a compensable injury *to a subject worker* or the worker's beneficiaries by an insurer or self-insured employer pursuant to this chapter." (emphasis added). Therefore, to refuse to pay a claim for compensation on the ground that a claimant was not a subject worker (as Costco did in this case) is to deny entitlement to compensation, by definition. *See* ORS 656.005(8). Further, had the ALJ upheld Costco's subjectivity denial and determined that claimant was not a subject worker, he would not have been entitled to compensation. *See* ORS 656.017; *Ronald C. Groat*, 53 Van Natta 320, 321 (2001) (the claimant was not entitled to benefits because he was not a subject worker).

Under such circumstances, we find that Costco’s July 2021 subjectivity denial constituted a refusal to pay a claim for compensation on the ground that the claim “otherwise does not give rise to an entitlement to any compensation.” *See* ORS 656.386(1)(b); *Wart*, 192 Or App at 512-13. Therefore, Costco’s subjectivity denial was a “denied claim” under ORS 656.386(1)(b). *See Wart*, 192 Or App at 512-13.

Moreover, because the ALJ found that claimant was a subject worker and set aside Costco’s July 2021 denial (a decision that Costco has not contested on review), claimant has finally prevailed over the subjectivity denial. *See* ORS 656.386(1)(a). Therefore, claimant’s attorney is entitled to a reasonable attorney fee under ORS 656.386(1).<sup>4</sup> *See Wart*, 192 Or App at 512-13, 515; *Carl S. Ward*, 71 Van Natta 484, 485, 492 (2019) (ORS 656.386(1) attorney fee awarded where “subjectivity” was the only issue and the carrier had denied the claimant’s injury claim on the basis that the claimant was not a subject worker); *Gurdev S. Sohl*, *DCD*, 62 Van Natta 610, 610, 617 (2010) (same).

In reaching the above conclusion, we distinguish *James Crawley*, 47 Van Natta 364 (1995), *Stephen M. Olefson*, 46 Van Natta 1762 (1994), *Michael A. Haggenson*, 45 Van Natta 2323 (1993), and *John A. Coffman*, 45 Van Natta 869 (1993). In those cases, we held that an ORS 656.386(1) attorney fee was not awardable because subjectivity, not compensability, was at issue. *Crawley*, 47 Van Natta at 367; *Olefson*, 46 Van Natta at 1762; *Haggenson*, 45 Van Natta at 2323; *Coffman*, 45 Van Natta at 869. However, we decided the foregoing cases before the 1995 amendment to ORS 656.386, in which the legislature added the “otherwise does not give rise to an entitlement to any compensation” language discussed above. *See* Or Laws 1995, ch 332, § 43.

Here, unlike the above cases, which were decided before the 1995 amendment, Costco’s subjectivity denial constituted a refusal to pay compensation on the basis that the claim “otherwise does not give rise to an entitlement to any compensation” (language that was not a part of ORS 656.386 at the time of *Crawley*, *Olefson*, *Haggenson*, and *Coffman*). Under such circumstances, *Crawley*, *Olefson*, *Haggenson*, and *Coffman*, are inapposite. *See Wart*, 192 Or App at 517-18 (distinguishing *Greenslitt v. City of Lake Oswego*, 305 Or 530 (1988), because that case was decided before the legislature amended ORS 656.386 to include the “otherwise” language).

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<sup>4</sup> The ORS 656.386(1) attorney fee awarded in this order is in addition to the ORS 656.308(2)(d) attorney fee awarded in the ALJ’s Order on Reconsideration, which was not challenged on review. *See also Tamara J. Bierman*, 65 Van Natta 1520 (2013) (awarding both an ORS 656.386(1) attorney fee and an ORS 656.308(2)(d) attorney fee); *Keith E. Testerman*, 61 Van Natta 12 (2009) (same).

Costco contends that ORS 656.386(1) does not apply because its denial pertained only to responsibility, not compensability. However, Costco's denial was not limited to responsibility. (Ex. 8-1-2). Costco also denied claimant's injury claim on the basis that claimant was not a subject worker, as set forth above. (Ex. 8-1). In addition, before the hearing, Costco confirmed that it was disputing both subjectivity and responsibility. (Tr. 3-4). Further, ORS 656.386(1) is not limited to compensability denials, but also applies to a refusal to pay a claim for compensation on the ground that the claim "otherwise does not give rise to an entitlement to any compensation." *See Wart*, 192 Or App at 512-13, 515. As reasoned above, Costco's subjectivity denial falls within the latter category. *Id.*

In sum, for the aforementioned reasons, we conclude that ORS 656.386(1) applies to Costco's subjectivity denial. *See Wart*, 192 Or App at 512-13, 515; *Ward*, 71 Van Natta at 492; *Sohl, DCD*, 62 Van Natta at 617. Accordingly, we reverse that portion of the ALJ's order that declined to award an ORS 656.386(1) attorney fee.

Finally, claimant has requested "bifurcation" of the attorney fee award in this case. *See* OAR 438-015-0125. Under such circumstances, we award a reasonable attorney fee for claimant's counsel's services at the hearing level regarding the "subjectivity" issue, in an amount to be determined in Workers' Compensation Board (WCB) Case No. 22-00007BF (payable by Costco) after this order becomes final.<sup>5</sup>

### ORDER

The ALJ's order dated March 1, 2022, as reconsidered on April 28, 2022, is affirmed in part and reversed in part. That portion of the ALJ's order that declined to award an ORS 656.386(1) attorney fee is reversed. For services at the hearing level regarding the "subjectivity" issue, claimant's counsel is awarded an assessed fee under ORS 656.386(1), payable by Costco.<sup>6</sup> The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on March 10, 2023

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<sup>5</sup> Claimant's attorney is not entitled to an assessed fee under ORS 656.386(1) for services on review regarding the attorney fee issue. *See James L. Williams*, 67 Van Natta 664, 670 n 8 (2015) (the claimant's attorney was not entitled to an attorney fee for services on review regarding an attorney fee issue); *compare* ORS 656.382(3) (where an attorney fee is awardable when the carrier raises the attorney fee issue on review). Further, subjectivity was not an issue on review.

<sup>6</sup> Pursuant to the procedures prescribed in OAR 438-015-0125, the amount of this attorney fee shall be determined in WCB Case No. 22-00007BF.